82 - 2125

NO.

FILED
JUN 27 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, and ROBERT T. DOYLE as Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellees.

On Appeal from the New York State Court of Appeals

JURISDICTIONAL STATEMENT

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Counsel for Plaintiffs-Appellants

June 21, 1983

Questions Presented

I

Does the Twenty-first Amendment to the Constitution of the United States permit the City of New York to enact laws violative of other federal constitutional guarantees?

The local tax ordinance involved here is similar in form and substance to the tariffs collected by the United States Customs Service.* It is not a tax on a sales price and is open to the same objections as any tariff on any other product entering the City. It incorporates by reference Article 18** of the New York State Tax Law and impermissibly burdens and regulates interstate commerce: Tax Law §421 requires registration of distributors (importers) even prior to the first sale by the importer; §422 requires bonding of distributors; §426 maintenance of records of purchases and sales; §428 records and reports of transportation within and without the state; and §433, criminal penalties for violations. Under this New York City ordinance, a distributor is defined as "any person who *imports* or causes to be *imported* any alcoholic beverages which are or will be offered for sale or used for any commercial purpose". There are no distilleries in New York State, and the above provisions are clearly a direct burden on interstate commerce in practical effect. "Under the Constitution, this is a domain where Congress alone has the power or regulation and control."

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* Cf Tariff Schedules of United States Annotated (1981) Schedule I, part 12—Beverages page 88.

** §Y46-3.0.

II

Does Local Law No. 30 of 1980 of the City of New York violate the Supremacy Clause in Article VI, Cl. 2, of the Constitution of the United States?

Plaintiffs-appellants pleaded in their Complaint that Bulletin 529 of the State Liquor Authority illegally mandated the additional payment of an *unauthorized** 20% amount of the tax at the request of the wholesalers was a *per se* anti-competitive violation of the Sherman Antitrust Act (15 U.S.C. 1) and the Supremacy Clause of the United States Constitution. *Community Communications Co.* v. *City of Boulder,* 455 U.S. ——, January 17, 1982, 103 S.Ct. 835, is a case in which this Court granted certiorari, and is similar in principle to the instant case here on appeal from the New York Court of Appeals in that the Federal Court of Appeals made the same error as the State Court here as to exactly what was in issue before the Court. 630 F.2d 704, 706 and 718.

III

Does Local Law No. 30 of 1980 of the City of New York violate the Commerce Clause in Article I, Section 8, of the Constitution of the United States?

The imposition of the burden of the Tax Law, Sections 421, 422, 426, 428 and 433, incorporated into the local ordinance by reference, is repugnant to the right of Congress to regulate interstate commerce. Furthermore, wine, a domestic product, is excluded from tax under the City ordinance, so that it imposes a burden on liquor which intrastate commerce does not bear, so that if the power to tax were sustained, the City would be left free to exert it to the detriment of national commerce.

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* Invalidated in *Mancini* v. *McLaughlin,* 54 N.Y.2d 860, amd. 54 N.Y.2d 863, which did not involve the tax.

IV

Does Local Law No. 30 of 1980 of the City of New York violate the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States?

The illegally required payment of 20% of tax to wholesalers, invalidated in an independent action, constitutes a taking of property within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution. Bulletin 529 was invalidated in an action not involving the tax, in *Mancini* v. *McLaughlin,* 54 N.Y.2d 860, amd. 54 N.Y.2d 863. For fiscal 1981 and 1982 alone, this illegal exaction amounted to $1,906,859.60, no part of which has been refunded, even though the Bulletin has been invalidated.

V

Does Local Law No. 30 of 1980 of the City of New York violate the Import-Export Clause in Article I, Section 10, of the Constitution of the United States?

Plaintiff-Appellant William Grant & Sons, Inc. is a Federally licensed importer and this tax intercepts its imports prior to the first sale.* There is already a multiplicity of taxes here with the State tax of 85.9¢ per liter on top of the City tax of 26.4¢ per liter, although Tax Law §445(4) curiously states that payment of the state and local taxes shall not be construed as the payment of either tax more than once.

VI

Does Local Law No. 30 of 1980 of the City of New York violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States?

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* *Brown* v. *Maryland,* 12 Wheat. 419.

A legislature cannot constitutionally discriminate in legislation between those in a group having definite attributes of identities as this local law does as between wholesalers and retailers, both of whom can reasonably import into the City of New York.

List of All Other Parties (Intervenors-Appellants)

Ace Wine & Liquor Corp., William J. Mezzetti Associates, Inc., Globe Liquor Inc., J & J Wine & Liquor Shop Inc., Leiser Liquor Inc., Frank Mancini, Jr., K.G.K. Corp., Liquor Emporium Inc., Berku Spirits Co. Inc., Nathan D. Fein Liquors Inc., 547 Liquor Corp., 37 St. Nicholas Corp., L. G. Liquor Corp., Swaby Package Store Inc., McAdam Liquor Company Inc., Harvey Entin d/b/a Oz Liquor Company, Smart Shopper Liquor Corp., Henry Kosiner, as Executor of the Estate of Lawrence Kosiner, Twin Towers Wine & Spirits Inc., 202 Discount Liquor Inc., Donmar Wine & Liquor Inc., Sidal Liquor Corp., Skyview Liquor Store Inc., Wakefield Wine & Liquor Corp., Irving Friedman and Norton Goldman d/b/a West Bronx Liquor Store, Zimmerman Liquor Inc., Roger Borello, Seymour J. Cash Inc., Interboro Wine & Liquor Inc., Kings Plaza Liquor Corp., 3080 Wines & Liquors Inc., Schacher Liquor Store Inc., Starrett City Wine & Liquors Inc., World Liquors Inc., Tozzi's Discount Liquors Inc., Richmond Liquor Corp., Staten Island Wine & Liquor Corp.

MEMBERS OF RETAILERS ALLIANCE, INC.

William H. Van Fleck Inc.
d/b/a Van Flock Liquors
116 Montague Street
Brooklyn, New York

Abramsky Wines & Liquors Inc.
d/b/a Van Fleck Liquors
55 W. 14 Street
New York, New York

Aylesbury Spirits Ltd.
d/b/a Cork & Bottle Wines & Liquors
1158 First Avenue
New York, N. Y. 10021

Diane Serra Inc.
d/b/a Gotham Liquors
1543 Third Avenue
New York, N. Y. 10028

Jack R. Battipaglia
d/b/a Grand Wines & Liquors
30-05 31 Street
Long Island City, N. Y. 11102

Forest Hills Liquors Corp.
108-09 Queens Boulevard
Forest Hills, N. Y. 11375

Derku Spirits Co.
d/b/a Excelsior Wines & Liquors
332 W. 57 Street
New York, N. Y. 10019

Arthur M. Ehrlich Inc.
222 Amsterdam Avenue
New York, N. Y. 10023

Lorraine Buscami
d/b/a Golden Liquors
41-07 Bell Boulevard
Bayside, New York 11361

North End Wine & Liquor Store Inc.
d/b/a North End Liquors
2509 Webster Avenue
Bronx, New York

Esposito Wines & Liquors Inc.
608 W. 207 Street
New York, N. Y. 10034

Paul Feuerstadt
d/b/a Tops Liquors
2816 Avenue U
Brooklyn, New York

Guliano Wines & Liquor Inc.
Korvettes Shopping Center
Bruckner Blvd. & White Plains Road
Bronx, N. Y. 10473

Myrtle Discount Center Liquors Inc.
d/b/a Queens Wines & Liquors
59-03 71 Avenue
Ridgewood, N. Y. 11227

Gold Star Wines & Spirits Inc.
d/b/a Enoteca
103-05 Queens Boulevard
Forest Hills, N. Y. 11375

Acker Merrall & Condit Liquors Inc.
2373 Broadway
New York, N. Y. 10024

Liquor City of Majors Inc.
Frank Grobman, David Gross, Alan
Gross, a Joint Venture
d/b/a Liquor City of Majors
2239 Forest Avenue
Staten Island, N. Y. 10303

Kings Plaza Liquor Corp.
d/b/a Kings Liquor Plaza
2418 Flatbush Avenue
Brooklyn, N. Y. 11234

Robert Merson
d/b/a Friedland Wines & Liquors
605 Lenox Avenue
New York, N. Y. 10037

Marrell & Co. Wines Emporium Ltd.
307 E. 53 Street
New York, N. Y. 10022

Bay Ridge Liquor Co. Inc.
d/b/a Bay Ridge Liquors
425-86 Street
Brooklyn, New York 11209

Richmond Liquor Corp.
d/b/a Liquor Giant
Staten Island Convenience Mall
Staten Island, N. Y. 10314

Principe Wines & Liquors
45-22 46th Street
Long Island City, N. Y. 11040

Ritter Wines & Liquor Inc.
549 Classon Avenue
Brooklyn, New York 11238

Mar-Pat Liquors
3112 Farrington Street
Pathmark Shopping Center
Whitestone, N. Y. 11354

Columbus Circle Liquors Inc.
1780 Broadway
New York, N. Y. 10019

383 Discount Supermarket
d/b/a First Avenue Wine Shop
383 First Avenue
New York, N. Y. 10010

Brills Liquor Mart Inc.
150 Chambers Street
New York, N. Y. 10007

Astor Wines & Spirits Inc.
12 Astor Place
New York, New York

Julia Provato
d/b/a A & J Provato Liquors
6415 18 Avenue
Brooklyn, N. Y. 11204

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, and ROBERT T. DOYLE as Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellees.

On Appeal from the New York State Court of Appeals

JURISDICTIONAL STATEMENT

Metropolitan Package Store Association, Inc.; Paul Wayne, d/b/a Colony Liquors; and William Grant & Sons, Inc., Plaintiffs-Appellants, appeal from the final judgment of the New York State Court of Appeals dated March 29, 1983, leaving standing the order of the New York Supreme Court, Appellate Division, Third Department, entered November 16, 1982, affirming the judgment entered in the Supreme Court, Albany County, (1) granting Defendants-

Appellees' motion for summary judgment; (2) denying the motions of Plaintiffs-Appellants and Plaintiffs-Intervenors-Appellees for summary judgment; and (3) dismissing the complaints of Plaintiffs-Appellants and Plaintiffs-Intervenors-Appellees.

The New York State Court of Appeals, in a final order dated March 29, 1983, granted Defendants-Appellees' motion to dismiss the appeals to that Court on the ground that there was no substantial constitutional questions directly involved in them.

Opinions Below

The opinion of the New York State Court of Appeals, which appears in the appendix hereto, p. 1a, *infra*, is reported at N.Y.2d (1983).*

This action was commenced in the New York State Supreme Court, Albany County, on or about August 18, 1980, and a preliminary injunction was granted to the Plaintiffs-Appellants by the Hon. John H. Pennock in the New York State Supreme Court, Albany County,** on the grounds that Local Law No. 30 of 1980 of the City of New York violated the Constitution of the United States, and the Plaintiffs were entitled to an injunction pursuant to Section 432 of Article 18 of the Tax Law. The Defendants-Appellees immediately filed an appeal with the Supreme Court, Appellate Division, Third Department, and obtained an automatic statutory stay pursuant to CPLR §5519(a)(1). The Appellate Division, Third Department, handed down its opinion in writing on March 5, 1981 in which it modified the order of Special Term of September 23, 1980, reversing so much as granted Plaintiffs-

* Appendix 1a.

** Appendix 48a.

Appellants' motion for a preliminary injunction, and as so modified, affirmed and refused to dismiss the Complaint. The opinion of the Appellate Division of March 5, 1981 makes no reference at all to the constitutional point in the order of Special Term, nor did it address itself to the statutory authorization to issue an injunction on constitutional grounds granted pursuant to Section 432 of Article 18 of the Tax Law, reference to which was made in the order of the Hon. John H. Pennock of September 23, 1980. The opinion of the Appellate Division appears in the appendix hereto, p. 49, *infra*, and is reported at 80 A.D.2d 928, 437 N.Y.S.2d 928 (1981).

After hearing oral argument on the merits, the New York Supreme Court, Albany County, Special Term, granted Defendants-Appellees' motion to dismiss the Complaint by order dated January 22, 1982. There was an unreported opinion of Hon. John H. Pennock dated November 5, 1981, and an amended opinion dated November 24, 1981, copies of both of which are reprinted in the appendix hereto, p. 7a *infra*.

The Order of Special Term dated January 22, 1982 was thereafter appealed to the New York State Supreme Court, Appellate Division, Third Department, and upon that appeal, the Judgment was affirmed. The opinion is reprinted in the appendix hereto, p. 20a *infra*, and is reported at A.D.2d , 457 N.Y.S.2d 481.

The matter was appealed to the New York State Court of Appeals, and that Court, by final order dated March 29, 1983, granted a motion to dismiss the appeal holding that there was no substantial constitutional question directly involved.

This appeal is being docketed in this Court within 90 days from the date of the decision of the New York State Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Constitutional Provisions and Statutes

Twenty-first Amendment, United States Constitution:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Article VI, Cl. 2, United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article I, Section 8, of the United States Constitution:

The Congress shall have Power • • • To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Amendment V of the United States Constitution:

No person shall • • • be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1, of the United States Constitution:

No State shall • • • deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10, Cl. 2, United States Constitution:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

The pertinent portions of *Local Law No. 30 of the City of New York* read as follows:

§Y46-1.0. Definitions. • • •

6. "Distributor." Any person who imports or causes to be imported into this City any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufactures, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale, • • •.

§Y46-2.0. Imposition of tax.

(a) There are hereby imposed on a distributor and a noncommercial importer excise taxes at the following rates:

• • •

(2) twenty-six and four-tenths cents per liter upon liquors, when sold or used within this city, • • •.

A complete copy of the Local Law is reprinted at p. 57a.

Raising the Federal Question

At the earliest possible stage of the proceedings below, the Plaintiffs-Appellants raised the claims herein in their Complaint, as indicate both by the Complaint and the order of Hon. John H. Pennock dated September 23, 1980, where he granted "the Motion for Preliminary Injunction on the grounds that Local Law No. 30 of 1980 of the City of New York violates the Constitution of the United States, and that the plaintiffs are entitled to said injunction without an undertaking pursuant to Section 432 of Article 18 of the Tax Law."

These constitutional claims were reiterated by the appellants before the Supreme Court, Appellate Division, Third Department, and were considered by that Court in its opinion of November 4, 1982 under the captions "Export-Import Clause", "Commerce Clause", "Due Process", "Equal Protection", "Supremacy Clause", and "Remaining Challenges". The same arguments were advanced in the New York State Court of Appeals as were advanced in the courts below, and that Court dismissed this action in its opinion of March 29, 1983, stating that there was no substantial constitutional question directly involved. It thus considered and expressly rejected these Federal constitutional claims.

Statement of the Case

The Plaintiffs-Appellants in this case are a trade association of retail liquor dealers, one of its members operating a retail liquor store, and an importer of Scotch Whisky which operates distilleries in Scotland and has its bonded warehouses and its principal offices in Edison, New Jersey. Under New York State law, an importer must be licensed as a wholesaler, and he may sell to other wholesalers or retailers; he may not sell to consumers (ABC Law, §62). A retail license is required for retail sales, and wholesalers may not hold a retail license. A retail licensee under New York law only sells liquor and wine and may not engage in the sale of beer, so that beer is not in issue in this case.

On or about June 23, 1980, the City of New York enacted Local Law No. 30 of 1980 of said City, which by its terms imposes an excise tax in Section Y46-2.0 of 26.4¢ per liter upon* "any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose". Said Local Law was thereafter made effective on August 1, 1980.

The New York State Liquor Authority thereafter implemented said Local Law No. 30 by mandating increases in liquor prices on sales by licensed retail package stores of 20% of the tax by issuing Bulletin No. 529 of 1980 under color of law. This bulletin was issued by the Authority after it had meetings with the State Department of Taxation and Finance, personnel from the New York City Finance Administration, and representatives of virtually all of the wholesale liquor dealers within the State of New

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* §46-1.0(6).

York. In article FIFTH of the Complaint, it is alleged that Bulletin No. 529 constitutes a price fixing agreement between the State Liquor Authority and certain wholesalers, without authority in law, and as such is a patent violation of the Sherman Anititrust Act (15 U.S.C. Sec. 1) and the Robinson-Patman Act (15 U.S.C. Sec. 13a) and by reason thereof, constitutes violations of the Supremacy Clause and the Commerce Clause of the United States Constitution. Further it is alleged that the Local Law deprives the plaintiff retailers of equal protection of law provided to them by the Fourteenth Amendment to to the Constitution of the United States, and they are denied due process in that they are being deprived of their property by paying over a mandated 20% of the tax under the color of law under a bulletin that has since been invalidated.

After the New York State Liquor Authority had issued its Bulletin No. 529, this action was commenced for declaratory judgment and injunction to restrain its enforcement.

On September 23, 1980, Special Term issued a preliminary injunction on the grounds that Local Law No. 30 of 1980 violated the Constitution of the United States. On appeal the Appellate Division reversed and lifted the preliminary injunction, but held that the Complaint stated a cause of action, but its opinion did not address itself to the constitutional points.

Thereafter, on the merits in the Supreme Court, the Complaint was dismissed principally because the Court of Appeals had in the meantime handed down its opinion in the independent case of *Mancini* v. *McLaughlin*, 54 N.Y.2d 863, which was not a tax case, but directed solely at Bulletin No. 529, and the Court held that the State Liquor Authority had acted in excess of its authority in issuing

that bulletin. Except to the extent that it invalidated Bulletin No. 529, it was in no way dispositive of the other issues here. Plaintiffs here had made the same contention in their Complaint in this case along with numerous others.*

Thereafter, an appeal on the merits was again taken to the Appellate Division, Third Department, from the order of Special Term entered January 29, 1982, and that Court rendered its decision on November 4, 1982.

The Appellate Division, Third Department, in its decision misconceives the thrust of the XXI Amendment; it was only cited below to show that the City ordinance in no way benefits from the protection of the Amendment. The Court does not distinguish between the exercise of police power and taxing powers of the City in discussing the Amendment. The attempt to regulate commerce by the City is sufficient to invalidate the local law.

As noted supra, Local Law No. 30 of 1980 enacted at tax of 26.4¢ upon sales of liquor in the City of New York. Bulletin No. 529 of the State Liquor Authority, which was issued at the request of wholesalers, imposed an additional charge of 20% of the tax. Plaintiffs contended this was price fixing *per se* and without statutory authority. The Appellate Division, however, held this was "not at issue here". This was the same error as was made by the Federal Court of Appeals in *Community Communications Company* v. *City of Boulder*, 639 F.2d 704, 706 and 718, but this Court granted certiorari and reversed.

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* At the time of the re-argument in January 1982, Bulletin No. 529 had not been rescinded and in fact, its rescission was not finally made effective until May 1, 1982 with the issuance of Bulletin 535, even though the decision of the Court of Appeals was in October of 1981.

As to the Import-Export Clause, it will be noted that the tax is aimed at imports by reason of the definition of "distributor" in the ordinance* and because of the fact that there are no distilleries in New York State. The tax under the local law is triggered by the liquor moving in commerce and attaches to the first sale while the product is still in the hands of the importer. Plaintiff-Appellant Willam Grant & Sons imports scotch whisky from its distilleries in Scotland, and the tax under the local law intercepts this import.

Tax Law §445(4) appears to anticipate an attack on the tax on the ground of multiplicity of taxation when it provides in part: "• • • Nothing in this article which requires payment of both state and local taxes to the tax commission shall be construed as the payment of either tax more than once". In reality, the same tax is being assessed twice.

It is significant, also, that Tax Law §427 of Article 18 contains a cross-reference to exemption from sales taxes (now obsolete), but the Appellate Division nonetheless characterizes this customs type tax as a tax on local sales by a City.

As to the Commerce Clause, the Appellate Division curiously says that the imported liquor has virtually an exclusive nexus with New York City under this customs type tax by a City levied on a liter of liquor which ignores the distilling of scotch abroad, its importation into this country by a licensed importer, the payment of Federal tariffs on the import and costs of transportation and with no allocation of the cost factors making up the liquor as taxed. It cannot be said here that all of the events upon which the tax is conditioned occurred in New York City. The preparation of the product and its packaging occur elsewhere. Cf. *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, 260. This is not a tax on the sales price. In ad-

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* Y46-1.0(6).

dition, wine, a domestic New York State product, is excluded from tax by definition,* although taxed under the State statute.

As to due process, the Appellate Division again disposes of this contention by stating it was based on the infirmities of Bulletin 529, and even though the Court of Appeals voided that bulletin on very narrow grounds. The Appellate Division, nevertheless, held it is beyond the scope of the appeal. But see comments above with respect to *Community Communications Co.*

As to the argument under the Equal Protection Clause, that, too, is swept away with the "ill-fated Bulletin 529". It is curious that the plaintiffs who make the same contention are denied relief in this action because others were successful on this point in another action, and where there has been an illegal exaction of $1,906,859.60 in the first two years of the tax.

The Questions are Substantial

In this local ordinance we have an assessment which is closely akin to a customs tax and is similar in format to the tariffs of the United States Government. It is not protected by the Twenty-first Amendment, because that amendment by its terms applies only to a "State, Territory or possession of the United States", and clearly a city ordinance is not within its scope, nor can such local municipal ordinance benefit from the powers granted for this in a nation of States, and the federalism principle "makes no accommodation for sovereign subdivisions of States". *Community Communications Co., Inc.* v. *City of Boulder*, 455 U.S. ——, January 17, 1982, 103 S.Ct. 835.

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* §Y46-1.0(5).

The City of New York is in no better or different position than it would be had the Twenty-first Amendment never been adopted since it does not by its terms apply to it. In *State Board of Equalization* v. *Young's Market Co., et al.*, 299 U.S. 59, 62, the Court in an opinion by Justice Brandeis held that a state might subject commerce in liquor destined for use within the state to any burden it might choose. California had imposed a $500 license fee for the privilege of importing beer into the state, and the importer sued to enjoin enforcement of the fee. The Court held that "Prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide."

This customs type tax can be applied to any other product that might be imported into the State if the Court's opinion in this case is sustained for the reason that the City of New York is not protected under the Twenty-first Amendment even as to liquor, and shippers of flour, lumber or any other commodity will be in the same position as the importers of liquor: the logical extension of the principle here would permit taxation of these other products.

This is a cleverly drafted piece of legislation, but the teachings and decisions of this Court are to the effect that: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Counsel for Plaintiffs-Appellants

June 21, 1983

APPENDIX

Opinion of New York State Court of Appeals
March 29, 1983

COURT OF APPEALS

State of New York

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3 Mo. No. 144

METROPOLITAN PACKAGE STORE, ASSOCIATION, INC., et al.,

Appellants,

vs.

EDWARD I. KOCH, as Mayor of the City of New York, *et al.*,

Respondents,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellants.

Motion to dismiss the appeals herein granted and the appeals dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

Chief Judge Cooke took no part.

Decision Court of Appeals Mar 29 1983

Order of New York State Court of Appeals
March 29, 1983

COURT OF APPEALS

State of New York

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of March A.D. 1983

PRESENT, Hon. Mathew J. Jasen, Sr. Associate Judge, Presiding:

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3 Mo. No. 144

METROPOLITAN PACKAGE STORE, ASSOCIATION, INC., *et al.*,

Appellants,

vs.

EDWARD I. KOCH, as Mayor of the City of New York, *et al.*,

Respondents,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellants.

Order of New York State Court of Appeals
March 29, 1983

A motion having heretofore been made herein upon the part of respondents Koch and City of New York to dismiss the appeals taken by the appellants and the intervenors-appellants in the above cause to this Court, said motion having been joined in upon the part of respondent State Tax Comimssion, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeals dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

Chief Judge Cooke took no part.

JOSEPH W. BELLACOSA
Clerk of the Court

Opinion of Appellate Division, Third Department
March 5, 1981

SUPREME COURT
Appellate Division, Third Department

March 5, 1981

METROPOLITAN PACKAGE STORE
Association Inc. *et al.*,

Respondents,

v.

EDWARD I. KOCH, as Mayor of the City of New York, *et al.*,

Appellants.

MEMORANDUM BY THE COURT

Appeal from an order of the Supreme Court at Special Term, entered September 24, 1980 in Albany County, which granted plaintiffs' motion for a preliminary injunction and denied the City of New York's cross motion to dismiss the complaint.

Plaintiffs, a trade association of retail liquor dealers in New York City, one of its members and a liquor distributor in New York City, commenced this action seeking a declaratory judgment declaring Local Law No. 30 of 1980

of the City of New York unconstitutional, and a permanent injunction enjoining the administration and enforcement of the local law. Local Law No. 30 of 1980 of the City of New York, enacted pursuant to section 445 of the Tax Law, imposes an excise tax on distributors and noncommercial importers of beer and alcohol sold or used in the city and a floor tax on persons who own or possess certain amounts of beer or alcohol on the effective date of the local law. The taxes are administered by the State Tax Commission (Tax Law, § 445, subd. 4), which pays the taxes collected to the city (Tax Law, § 445, subd. 7). After the State Liquor Authority issued a bulletin detailing the procedure to be followed in incorporating the tax in wholesale and retail prices, this action was commenced. Plaintiffs moved for a preliminary injunction and defendants cross-moved to dismiss the complaint. Special Term granted plaintiffs' motion and denied defendants' cross motion.

(1-3) In our view, Special Term erred in granting plaintiffs' motion. One of the conditions which plaintiffs must meet in order to establish their entitlement to a preliminary injunction is the showing of irreparable harm without the injunction (*Picotte Realty* v. *Gallery of Homes,* 66 A.D.2d 978, 412 N.Y.S.2d 47). Plaintiffs must show that the irreparable injury to be sustained by them is more burdensome to them than the harm caused by defendants through imposition of the injunction (*Nassau Roofing & Sheet Metal Co.* v. *Facilities Dev. Corp.*, 70 A.D.2d 1021, 1022, 418 N.Y.S.2d 216). In its affidavit in support of the motion for a preliminary injunction, the plaintiff trade association has alleged that its members "will be hard pressed to advance considerable sums of money to pay these taxes * * * [and] will be forced out of business in many cases." There is

nothing in the record to support this conclusory allegation. Since the taxes will be refunded if plaintiffs succeed on the merits, we perceive no irreparable harm. Moreover, the bulletin issued by the State Liquor Authority requires the retailer to pass the cost of the tax along to the consumer and thus it is not the retailer who is paying the tax. Plaintiffs also argue that they sell in quantity to persons outside the City of New York and that due to the taxes imposed by the local law, those consumers will now purchase from retailers outside of the city. They further argue that they will be unable to prove such losses at a later time. There is, however, no support in the record for either contention. Since plaintiffs have failed to establish irreparable harm, they are not entitled to a preliminary injunction.

(4) Defendants also contend that Special Term erred in denying their motion to dismiss the complaint, but we find the allegations of the complaint sufficient to withstand such a motion. Accordingly, the order appealed from should be modified by reversing so much thereof as granted plaintiff's motion for a preliminary injunction.

Order modified, on the law and the facts, and in the exercise of discretion, by reversing so much thereof as granted plaintiffs' motion for a preliminary injunction, and, as so modified, affirmed, without costs.

Opinion Supreme Court, Special Term
November 5, 1981; November 24, 1981

SUPREME COURT OF THE STATE OF NEW YORK
County of Albany

METROPOLITAN PACKAGE STORE ASSOCIATION, INC., PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs,

—against—

EDWARD I. KOCH as Mayor of the City of New York, THE CITY OF NEW YORK and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION, and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, ROBERT E. DOYLE and DOROTHEA J. KLAJBOR as the Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Plaintiffs-Intervenors.

Appearances:

Gerard A. Navagh
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Allen G. Schwartz, Esq.
Corporation Counsel
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The City of New York and Koch
100 Church Street
New York, New York 10007

Robert Abrams, Esq.
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Mehler & Buscemi, Esqs.
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New York, New York 10007

Seymour S. Howard, Esq.
Attorney for Plaintiffs-Intervenors
Ace Wines & Liquors, Inc., et al.
380 North Broadway
Jericho, New York 11753

(2) PENNOCK, J:

This is a motion by Metropolitan Package Store Association, Inc.; Paul Wayne, d/b/a Colony Liquors and Wil-

liam Grant & Sons, Inc., the plaintiffs in this declaratory judgment and action for injunction for an order striking out the defendants' answers and directing summary judgment in favor of the defendants,

(a) Decreasing and declaring that the provisions of Local Law No. 30 of 1980 of the City of New York are unconstitutional and void.

(b) Enjoining and restraining the defendants and their successors from administering and collecting taxes pursuant to said Local Law No. 30 of 1980 or imposing any sanctions or penalties for plaintiffs failure to comply with said Local Law.

The Plaintiffs-Intervenors join in the motion.

The Defendant, State Tax Commission, opposes.

The Defendant, Koch, herein referred to as City opposes plaintiffs motion and cross-moves for summary judgment.

The Plaintiffs commenced this action in August 1980 seeking a declaratory judgment declaring Local Law No. 30 of 1980 of the City of New York unconstitutional and seeking a permanent injunction enjoining the administration and enforcement of the Local Law. The Defendant timely served an answer.

Local Law No. 30 was enacted pursuant to Tax Law 445 and imposes an excise tax upon distributors and non-commercial (3) importers of alcohol sold or used in New York City and a floor tax upon persons who own or possess certain amounts of alcoholic beverages on the effective date of the Local Law August 1, 1980. On July 16, 1980 the State Liquor Authority issued Bulletin No. 529 which in effect implemented a system of collection of the tax by increas-

ing the price on alcohol which was eventually passed on to the consumer. (This issue has been determined by the Court of Appeals in another case which addressed itself to the same principle. It held that the State Liquor Authority exceeded the authority conferred upon it by statute.) Therefore, Bulletin No. 529 as an administrative act was null and void. As a result any issues regarding Bulletin No. 529 in this proceeding are considered to be favorably decided against the defendants. Therefore, the Answer and State Liquor Authority is dismissed based upon Mancini decision. (Mancini v. McLaughlin and others constituting the State Liquor Authority, —— NY 2nd —— decided October 13, 1981).

The City of New York contends that the Bulletin of the State Liquor Authority cannot be considered in determining the validity of Local Law 30 at this juncture, since the Court of Appeals resolved the issue as to Bulletin No. 529, it is not a part of the ingredient of constitutionality of Local Law 30 and any issues raised have been theretofor determined herein and the Bulletin has no further legal effect.* The Court agrees and Local Law No. 30 must now sustain itself as to constitutionality.

(4) In 1971, the State Legislature enacted Section 445 of the Tax Law (L 1971, Ch. 406, Sect. 1) which authorized any city in this State "having a population of one million or more, acting through its legislative body" to adopt and amend local laws imposing in any such city "excise taxes on a distributor and a non-commercial importer" at certain specified rates on beer and liquor "when sold or used in such city."

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* See letters Koch, City Corporation Counsel, Oct. 13, 1981, Oct. 20, 1981 subsequent to Mancini Decision, Ct. of Appeals Oct. 13, 1981.

This enabling act also contains the following provisions:

"3. All the provisions of this article shall apply to the taxes authorized by subdivision one of this section and the provisions of section four hundred twenty, four hundred twenty-six, four hundred twenty-nine through four hundred thirty-four, four hundred thirty-six and four hundred thirty-seven shall apply to the tax authorized by subdivision two thereof, so far as such article or sections can be made applicable to the taxes authorized by this section with such limitations as set forth in this section and such modifications as may be necessary in order to adapt such language to the local taxes authorized by this section. Provided, however, in every case where the words "this state" appear in subdivision four of section four hundred twenty-four exempting quantities of liquor from tax, and in the definition of "Distributor" or "Noncommercial importer" in section four hundred twenty, such words "this state" shall be read as "this city" for purposes of the taxes authorized by this section. Where the word "state" is used in a phrase (5) referring to the sale or use of alcoholic beverages in this state, such word "state" shall be read as "city for purposes of the taxes authorized by this section, unless the word "city" clearly is not applicable.

4. Any taxes imposed pursuant to the authority of this section shall be administered and collected by the tax commission in the same manner as the taxes imposed under sections four hundred twenty-four and four hundred twenty-five subject to all provisions

of this article as may be applicable. The state tax commission is hereby empowered to make such provisions as it deems necessary for the joint administration and collection of the state and local taxes imposed and authorized by this article. Nothing in this article which requires payment of both state and local taxes to the tax commission shall be construed as the payment of either tax more than once."

On June 23, 1980, the City of New York enacted Local Law No. 30 of 1980 which imposed an excise tax on a "distributor and non-commercial importer" at a rate of 26.4 cents per liter on liquor, when sold or used within this City is without power to impose such tax * * *." A copy of the Local Law 30 is annexed to the plaintiffs moving papers on this motion as Exhibit A.

Bulletin No. 529 was issued by the New York State Liquor Authority to implement the excise tax. Thus the excise tax was added to price by wholesalers by adding 20% to the price per each size container in accordance with a price schedule. This adopted procedure (6) is presumptive evidence of the discriminating practice and a violation of 101-b of the Alcoholic Beverage Control Law. This issue has been eliminated by the Mancini decision.

Bulletin No. 529 has been declared illegal by the Court of Appeals and thus the remaining question is the validity of Local Law No. 30.

(a) Does it violate the due process and equal protection of the laws clauses of the Federal and State Constitution?

(b) Does the law conflict with a general law, to wit, section 101-b of the Alcoholic Beverage Law?

(c) Is the law as enacted materially vague and ambiguous?

(d) Was the local law enacted in accordance with the provisions of the New York City Charter?

(e) Is the local law and Section 445 of Tax Law unconstitutional as violative of Import-Export Clause and Commerce Clause of the United States Constitution?

In the present posture of this case, I find that most of the issues except those questions set forth have been determined by the Court of Appeals in the Mancini case (Mancini Supra) except the questions set forth shall be addressed by this Court.

The City of New York in imposing the excise tax has imposed an excise tax on alcoholic beverages which is effective only within a political subdivision of the City of New York and not outside that political subdivision. (7) This is the first instance where there has been an increase in taxes on liquor in relation to a restricted area of the State, all other taxes were on a state-wide basis. Section 101-b of the Alcoholic Beverage Control Law prohibits differential in prices by wholesalers between one retailer and another. This law never anticipated the levy of this excise tax. The Local Law No. 30 is in direct conflict with Section 101-b of the Alcohol Beverage Control Law. However, I do not pass on this question since the elimination of Bulletin No. 529 of the S.L.A. leaves this issue in "limbo". There is nothing in the record that shows how the tax shall be administered in the future. It may be assumed that the Tax Commission shall collect the tax from the wholesalers and not the retailers. The imposition of this tax poses a strong question of double taxation as the liquor shall be subject

to two excise taxes—one by the State and a second by the city. It cannot be considered a sales tax and it has not been so designated.

The plaintiffs contend that the tax imposed by the Local Law violates the Import-Export Clause of the United States Constitution as well as its commerce clause. (Article I, 10 Clause 2 U.S. Constitution). The City's tax is imposed upon distributors at a specified sum per gallon of beer and per liter of liquor when sold or used within the city. (Adm. Code, Sect. Y 46-2.0, subd. (a) (8) A "distributor" is defined to include not only importers, but also persons acquiring alcoholic beverages stored in the city, as well as persons producing them within the city. Adm. Code Sect. Y 46-2.0, subd. 6 as follows:

> "Any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufacturers, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale, * * *".

This excise tax meets the test of Michelin Tire case when the Supreme Court held that a non-discriminatory ad valorem property tax imposed by a State upon an inventory of imported goods maintained in a warehouse in the State, whether or not in original packages, is not an import or duty on imports barred by the Import-Export Clause. Michelin held that the State excise tax, similar to the tax

under review here, was based upon the sale and use of liquor in New York City, and without a showing of discrimination does not interfere with commerce. For decades the Courts have sustained State excise taxes on sales of imported liquor after its importation into the state. [Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)]. In Seagram the State Courts have held that an excise tax on liquor (9) that comes to rest in New York State does not violate the Import Clause for the tax is simply not within the purpose of the constitutional prohibition. [Seagram v. State Liquor Authority, 25 NY 2nd 865 (1969) aff'd. on op. of App. Div. 30 A.D. 2nd 380 3rd Dept. 1968, App. dsm. 396 U.S. 121 1969.

The city urges that this city excise tax is a counterpart of the State tax on Alcoholic Beverages (Tax Law Art. 18), which imposes the State tax in language identical to that of the City's Tax Law on distributors. (See Tax Law 424 sub. 1; 420, sect. 4). Therefore, if the City tax law violates the Import-Export and Commerce Clauses of the Federal Constitution, then the State Alcoholic Beverage Tax Law would similarly be invalid. The principle as stated is correct, and the theory is correctly stated. However, there is a distinction in that the present excise tax is limited to a geographic area of the State. All of the cases cited by the city apply to a geographic state tax and not a limited geographic area, such as a city within the state, for example, Long Is. Oil v. Comd. of Trans. 70 AD 2nd 303.

Simply put, the Michelin rule does not apply to the local City excise tax because the tax does not produce a forbidden effect on interstate commerce. In any event, the present case presents no facts in the (10) record that any of the liquor taxed would find a destination outside New York

State. There is some proof by argument and in the record that indicates some plaintiffs sell to customers outside New York City but within New York State. This does not bring the constitutional prohibition into play. In conclusion, this Court finds no merit to the plaintiffs contention that the excise tax law violates the Import-Export or the Commerce Clauses of the United States Constitution.

Another primary contention of this plaintiff is that the Local Law violates the Equal Protection Clause. The elimination of the bulletin by Mancini strips the plaintiffs arguments of any violations. In respect to violation of due process in regard to classifications and use of terms such as "distributors" is of no consequence and has no more arbitrariness than other aspects of the tax law in regard to definitions. There is no merit to the plaintiffs contentions that Local Law as enacted contrary to the City Charter. No referendum is required to enact this Local Law. The mere administration of collection of taxes does not require a referendum.

Contentions of the plaintiff in respect to violation of the Sherman Anti Trust Act are without merit because Mancini has eliminated the bulletin (Mancini Supra).

All questions heretofore set forth for "a" to "e" are answered in the negative.

Summary Judgment is granted to the Defendant City.

All papers to Defendant City to submit judgment on notice.

Dated: Albany, New York
November 5, 1981

JOHN H. PENNOCK
Justice of Supreme Court

Opinion Supreme Court, Special Term
November 5, 1981, November 24, 1981

STATE OF NEW YORK

Supreme Court Chambers

Albany

(Seal)

John H. Pennock
Justice

November 24, 1981

Gerard A. Navagh, Esq.
Seymour S. Howard, Esq.
Mehler & Buscemi, Esqs.
Warren Pesetsky, Esq.
Robert Abrams, Esq.
Allen G. Schwartz, Esq.

Re: Metropolitan Package Store Assn., Inc. et al.
v. Edward I. Koch, et al
Decision dated November 5, 1981

Dear Counselors:

Enclosed please find two corrected pages to replace pages 8 and 9 of the above decision dated November 5, 1981. The changes are in form and not substance and more explicitly sets forth the intent of the decision. I do not see any resultant necessary changes in the submitted judgments, however, if any counsel desires to submit amended judgment he may do so. Please destroy pages 8 and 9 of the previous decision sent to you and insert these corrected cases.

Yours very truly,

s/ JOHN H. PENNOCK

nmc

(8) A "distributor" is defined to include not only importers, but also persons acquiring alcoholic beverages stored in the city, as well as persons producing them within the city. Adm. Code Sect. Y 46-2.0, subd. 6 as follows:

> "Any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufacturers, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale, * * *".

This excise tax meets the test of Michelin Tire case when the Supreme Court held that non-discriminatory ad valorem property tax imposed by a State upon an inventory of imported goods maintained in a warehouse in the State, whether or not in original packages, is not an import or duty on imports barred by the Import-Export Clause. Michelin held that the State excise tax, similar to the tax under review here, was based upon the taxpayer's inventory of tires imported into State of Georgia and here it is based on sale and use of liquor in New York City, and without a showing of discrimination does not interfere with commerce. (Michelin Tire Corp v. Wages, 423, U.S. 276 (1976). For decades the Courts have sustained State excise taxes on sales of imported liquor after its importation into the state. (Seagram v. State Liquor Authority, 25 NY 2nd 865 (9) (1969) aff'd. on op. of App. Div. 30 A.D. 2nd 380

3rd Dept. 1968, App. dsm. 396 U.S. 121 1969.) In Seagram the State Courts have held that an excise tax on liquor that comes to rest in New York State does not violate the Import Clause for the tax is simply not within the purpose of the constitutional prohibition.

The city urges that this city excise tax is a counterpart of the State tax on Alcoholic Beverages (Tax Law Art. 18), which imposes the State tax in language identical to that of the City's Tax Law on distributors. (See Tax Law 424 sub. 1; 420, sect. 4). Therefore, if the City tax law violates the Import-Export and Commerce Clauses of the Federal Constitution, then the State Alcoholic Beverage Tax Law would similarly be invalid. The principle as stated is correct, and the theory is correctly stated. However, there is a distinction in that the present excise tax is limited to a geographic area of the State. All of the cases cited by the city apply to a geographic state tax and not a limited geographic area, such as a city within the state, for example, Long Is. Oil v. Comd. of Trans. 70 AD 2nd 303. Also Roosevelt Raceway, Inc. v. County of Nassau, 18 NY 2d 30 (1966), remittitur den 18 NY 2d 720, and app dsmd 385 US 453.

Simply put, the Michelin rule does apply to the local City excise tax because the tax does not produce a forbidden effect on interstate commerce. In any event, the present case presents no facts in the

Opinion of Appellate Division, Third Department
457 NYS2d 481

SUPREME COURT

Appellate Division, Third Department

November 4, 1982

METROPOLITAN PACKAGE STORE ASSOCIATION INC. *et al.*,

Appellants,

and

ACE WINES & LIQUORS, INC., *et al.*,

Intervenors-Appellants,

v.

EDWARD I. KOCH, as Mayor of the City of New York, *et al.*,

Respondents.

WEISS, Justice.

Plaintiffs and plaintiffs-intervenors are either retailers, wholesalers, or a trade association of liquor retailers, who seek a judgment declaring that the provisions of Local Law No. 30 of 1980 of the City of New York are unconstitutional and void, and enjoining defendants from administering and collecting excise taxes pursuant thereto or from imposing sanctions or penalties for noncompliance. Said

local law was enacted by defendant City of New York pursuant to enabling legislation enacted by the Legislature as section 445 of the Tax Law in 1971 (L.1971, ch. 406, § 1), and imposes a New York City excise tax in the sum of 12 cents per gallon upon beer and 26.4 cents per liter on liquor, upon distributors and noncommercial importers of alcohol which is sold or used in New York City (Administrative Code of the City of New York, § Y46-2.0). The local law also included a one-time floor tax "upon persons owning or possessing specified amounts of alcoholic beverages on August 1, 1980", the effective date of the local law (*id.*). In order to implement collection of the excise taxes, defendant State Liquor Authority issued Bulletin 529 which required that wholesalers of liquor "collect" the taxes established plus the additional sum of 20% of such taxes. The Bulletin had the effect of mandating that wholesalers pass the tax plus a 20% markup thereon along to retailers who then included the increases in their minimum retail consumer prices. The complaint alleged, *inter alia*, that the provisions of the local law, as implemented by Bulletin 529, are unconstitutional as violative of the Supremacy Clause (U.S. Const., art. VI, cl. 2), the Commerce Clause (U.S. Const., art. I, § 8, cl. 3), the Import-Export Clause (U.S. Const., art. I, § 10, cl. 2), and the 14th Amendment (U.S. Const., 14th Amdt., § 1). The complaint also alleges violations of the New York State Constitution's prohibitions against incorporation by reference to other statutes (N.Y. Const., art. III, § 22, cl. 1; art. III, § 22, cl. 1; art. III, § 16), and of the due process clause (N.Y. Const., art. I § 6). Additionally, the complaint alleges that the Local Law, as implemented by Bulletin 529, violates State (General Business Law, § 340) and Federal law (U.S. Code, tit. 15, §§ 1, 13a) pro-

hibiting price fixing and restraint of trade. On March 19, 1981, this court reversed an earlier order at Special Term whi h granted plaintiffs' motion for a preliminary injunction, but affirmed the denial of defendants' motion for summary judgment dismissing the complaint (*Metropolitan Package Store Assn.* v. *Koch*, 80 A.D.2d 940, 941, 437 N.Y.S.2d 760). On October 31, 1981, the Court of Appeals held Bulletin 529 invalid and enjoined its enforcement by the State Liquor Authority on the ground that the Authority exceeded its statutory power to adopt regulations by directing that the excise tax and a 20% markup thereof be included in the retail price of alcoholic beverages (*Mancini* v. *McLaughlin*, 54 N.Y.2d 860, 444 N.Y.S.2d 901, 429 N.E.2d 408, remittitur amd. 54 N.Y.2d 863). Here, Special Term denied plaintiffs' motion to strike the answer and for summary judgment, and granted instead defendants' cross motion for summary judgment dismissing the complaint. After reargument, Special Term rendered final judgment declaring Local Law No. 30 of 1980 to be valid and constitutional, and dismissed the complaint insofar as it sought injunctive relief, giving rise to this appeal.

(1-4) Plaintiffs contends that our decision in *Metrooplitan Package Store Assn.* v. *Koch*, 80 A.D.2d 940, 437 N.Y.S. 2d 760 constitutes the law of this case,[1] and that plaintiffs

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[1] Special Term granted plaintiffs a preliminary injunction enjoining the administration and enforcement of Local Law No. 30, and denied the City of New York's cross motion to dismiss the complaint, made before its answer was interposed. In our decision, we reversed that portion of the order which granted plaintiffs a preliminary injunction, and affirmed the denial of the city's motion to dismiss the complaint, holding: "we find the allegations of the complaint sufficient to withstand such a motion" (*Metropolitan Package Store Assn.* v. *Koch*, 80 A.D.2d 940, 941, 437 N.Y.S.2d 760).

should be entitled to summary judgment on their constitutional attacks upon Local Law No. 30. This argument is without merit. The law of the case doctrine requires that once an issue is judicially determined, it is deemed to be conclusive as to courts of co-ordinate jurisdiction (*Martin* v. *City of Cohoes*, 37 N.Y.2d 162, 165, 371 N.Y.S.2d 687, 332 N.E.2d 867; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5501.11, p. 55-30). The rule is not inflexible (*People* v. *Leone*, 44 N.Y.2d 315, 320, 405 N.Y.S.2d 642, 376 N.E.2d 1287), and applies only to issues decided, directly or by implication, at an earlier stage of the action (Siegel, New York Practice, § 448, p. 593). Upon a motion to dismiss a complaint for legal insufficiency in an action for a declaratory judgment, the test "is not whether the complaint shows plaintiff will succeed in getting a declaration of rights in accordance with his theory and contentions, but whether he is *entitled to a declaration of rights at all.* If the complaint states the substance of a bona fide justiciable controversy which should be settled, a cause of action for a declaratory judgment is stated" (*Baldwin* v. *City of Buffalo*, 7 A.D.2d 386, 387, 183 N.Y.S.2d 576, citing 1 Anderson, Actions for Declaratory Judgments, p. 600). Having made no determination on the merits in plaintiffs' favor, Special Term was not obligated by this court's prior decision to render judgment in plaintiffs' favor.

IMPORT-EXPORT CLAUSE

(5) Local Law No. 30 does not violate the Import-Export Clause[2] which bans only imposts or duties on imports or exports. The subject tax is imposed in a non-discriminatory fashion upon importers and persons acquiring alcoholic beverages or producing them and is effective only upon the sale or use of such beverages in New York City after they have come to rest in the city—a purely local event. Consequently, the tax does not offend any of the policy considerations protective of Federal interests underlying the Import-Export Clause (see *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285-286, 96 S.Ct. 535, 540-541, 46 L.Ed.2d 495; see, also, *Dept. of Rev. of Washington*, v. *Assoc. of Washington Stevedoring Comps.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682). Moreover, the tax is not on the act of transporting or shipping beer and liquor into this State (*Dept. of Revenue* v. *James Beam Co.*, 377 U.S. 341, 343, 84 St.Ct. 1247, 1248, 12 L.Ed2d 362), but upon the sale or distribution after they have come to rest in New York City. Thus, the Import-Export Clause is not violated (see *House of York, Ltd.* v. *Ring*, 322 F.Supp. 530).

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[2] "No State, shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws; and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the use of the Treasury of the United States, and all such Laws shall be subject to the Revision and Control of the Congress" (U.S. Const., art. I, § 10, cl. 2).

COMMERCE CLAUSE

(6) We further hold Local Law No. 30 is not violative of the Commerce Clause.[3] Tax laws have been sustained so long as they have a substantial nexus with the taxing State, are fairly apportioned, do not discriminate against interstate commerce, and are fairly related to services provided by the State (*Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, see, also, *Dept. of Rev. of Washington* v. *Assoc. of Washington Stevedoring Comps., supra; General Motors Corp.* v. *Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430; *Northwestern Cement Co.* v. *Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421). To be remembered is the fact that the Commerce Clause does not state a prohibition; it merely grants specific power to Congress (*Dept. of Rev. of Washington* v. *Assoc. of Washington Stevedoring Comps.*, 435 U.S. 734, 749, 92 S.Ct. 1388, 1398, 55 L.Ed.2d 682, *supra*), and that interstate commerce must bear its fair share of the tax burden (*id.* at 750, 98 S.Ct. at 1399). The excise tax imposed by Local Law No. 30 being levied only upon goods sold or used in New York City, has virtually an exclusive nexus with that city, and does not unfairly discriminate against plaintiffs. Nor can it be said that the free flow of goods between States is seriously affected, because the tax applies only after the goods come to rest in New York City. Nothing in the record suggests

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[3] "The Congress shall have Power * * *

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes * * *."

(U.S. Const., art. 1, § 8, cl. 3).

that the tax is not fairly related to services and protection provided by the City of New York and there is no factual basis to declare the tax violative of the Commerce Clause.

DUE PROCESS

(7, 8) Plaintiffs contend Local Law No. 30 violates the 14th Amendment to the U.S. Constitution and section 6 of article I of the New York Constitution, because it is too indefinite, vague and unclear, and, as implemented, constitutes a taking of property without due process. Plaintiff-intervenor Ace Wines and Liquors, Inc., contends that the law denies retailers classification as "a distributor" which denies them the use of tax money and interest thereon from the time of their payment to the wholesalers until it is paid over to the State Tax Commission, and further that they are denied "distributor" status even though they frequently function as "importers" by causing beer and liquor to be brought into New York City. Initially, we note that a strong presumption of validity attaches to legislative enactments, imposing upon a party who challenges the constitutionality of a statute a heavy burden of establishing unconstitutionality beyond a reasonable doubt (*Nettleton Co.* v. *Diamond*, 27 N.Y.2d 182, 315 N.Y.S.2d 625, 264 N.E.2d 118, app. dsmd. *sub nom. Reptile Prods. Assn.* v. *Diamond*, 401 U.S. 969, 91 S.Ct. 1201, 28 L.Ed.2d 319; see, also, *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 54, 378 N.Y.S.2d 1, 340 N.E.2d 444). We reject plaintiff's vehement arguments centered upon the purported constitutional affirmities of Bulletin 529 which implemented the local law, and we hold that the determination by the Court of Appeals in *Mancini* v. *McLaughlin*, 54 N.Y.2d 860, 444

N.Y.S.2d 901, 429 N.E.2d 408, *supra*, clearly removes from the court's review the collection scheme delineated by the Bulletin. Although the Court of Appeals voided the Bulletin solely on the narrow issue that the State Liquor Authority had exceeded the powers given to it by statute, the Bulletin is no longer extant, and therefore any consideration of its infirmities or effects upon Local Law No. 30 is beyond the scope of this appeal.

There can be no doubt that the local law was enacted solely and simply as an exercise of the taxing power of the city and bears no motivation other than to raise revenue. "This being so, the due process clause may not here be availed of to condemn the statute. That clause, it has been said, 'is applicable to a taxing statute * * * only if the act to be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property'" (*Ampco Print-Advertisers' Offset Corp.* v. *City of New York*, 14 N.Y.2d 11, 24, 247 N.Y.S. 2d 865, app. dsmd. 379 U.S. 5, 85 S.Ct. 47, 13 L.Ed.2d 21, quoting from *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 44, 54 S.Ct. 599, 601, 78 L.Ed. 1109; see *Shapiro* v. *City of New York*, 32 N.Y.2d 96, 102, 343 N.Y.S.2d 323, app. dsmd. 414 U.S. 804, 94 S.Ct. 68, 38 L.Ed.2d 40). We find no forbidden purpose present, discounting again plaintiffs' arguments centered upon Bulletin 529, and hold that the terms of the law and its references to the Tax Law are clear and understandable to persons of "common intelligence" (*Connally* v. *Gen. Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322). Moreover, we reject plaintiffs' contention that retailers have been denied due process of law

because the local law does not classify them as "distributors". Defendants' interpretation of the word "import" in the definition of "distributor" refers to transactions in foreign commerce not intrastate commerce, and is neither arbitrary nor unreasonable (see *Matter of Burger King* v. *State Tax Comm.*, 51 N.Y.2d 614, 621, 435 N.Y.S.2d 689, 416 N.E.2d 1024). This interpretation conforms with common usage and meaning applied by the Tax Law (Administrative Code, § Y46-1.0, subd. 15; Tax Law, § 445, subd. 3).

EQUAL PROTECTION

(9, 10) The differential treatment afforded wholesalers and retailers is not violative of equal protection. This court has recently rejected a constitutional challenge to the taxing power of the City of New York (*Matter of Manganaro* v. *Tully*, 88 A.D.2d 206, 453 N.Y.S.2d 889 (unincoroprated business tax)). We noted "[i]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (quoting *Madden* v. *Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590), and that "[t]he test is whether the difference in treatment is an invidious discrimination" or is "palpably arbitrary" (citing *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351). The local law imposes the tax upon distributors who import into the city any alcoholic beverages for sale or use in the city, and does not distinguish between retailers and wholesalers. The distinctions complained of appeared in the ill-fated Bulletin 529, already declared void in *Mancini* v. *McLaughlin* (*supra*), and are no longer at issue. The Legislature has wide discretion in creating tax classifications (*Shapiro* v.

City of New York, 32 N.Y.2d 96, 103, 343 N.Y.S.2d 323, *supra*). The tax is imposed upon those who import alcoholic beverages for sale or use in the City of New York and since it is solely intended to produce optimum revenue, it is a valid legislative enactment (*Matter of Long Is. Light Comp.* v. *State Tax Comm.*, 45 N.Y.2d 529, 535-536, 410 N.Y.S.2d 561, 382 N.E.2d 1337). "[T]hat a 'fairer' taxing formula might have been adopted is of no moment" (*id.* at 535, 410 N.Y.S.2d 561, 382 N.E.2d 1337).

NEW YORK STATE CONSTITUTION

(11) Plaintiffs erroneously argue that both Local Law No. 30 and section 445 of the State Tax Law (L.1971, ch. 406, § 1) violate a provision of the State Constitution against incorporation of sections of other statutes by reference (N.Y. Const., art. III, § 22). It has been held that this section of the Constitution was originally intended to apply to annual recurring taxes known at the time of its adoption, imposed generally upon the entire property of the State (*Matter of McPherson*, 104 N.Y. 306, 10 N.E. 685; *Matter of Stickney*, 110 App.Div. 294, 296, 97 N.Y.S. 336) and does not apply to all local taxes (*Berkshire Fine Spinning Assoc.* v. *City of New York*, 5 N.Y.2d 347, 358, 184 N.Y.S.2d 623, 157 N.E.2d 614; see, also, *Jones* v. *Chamberlain*, 109 N.Y. 100, 108-109, 16 N.E. 72).

Plaintiffs' further argument that Local Law No. 30 violates section 16 of article III of the State Constitution prohibiting incorporation of statutes by reference without verbatim insertion of such act, similarly fails. Concededly, the enabling act and the local law both incorporate by reference other sections of the Tax Law dealing with ad-

ministration and collection. However, reference "to the procedure of an earlier general statute does not contravene this provision of the Constitution" (*Richfield Oil Corp.* v. *City of Syracuse,* 287 N.Y. 234, 240-241, 39 N.E.2d 219). Moreover, the enabling act was an amendment to article 18 of the Tax Law and as such was not a violation of section 16 of article III (*People ex rel. N.Y. Elec. Lines Co.* v. *Squire,* 107 N.Y. 593, 602, 14 N.E. 820).

SUPREMACY CLAUSE

(12) Plaintiffs argue that Local Law No. 30 constitutes pricefixing per se in violation of the Sherman Anti-Trust Act and the Supremacy Clause (U.S. Const., Art. VI, cl. 2). We disagree. Initially, we reject plaintiffs' argument as erroneously premised upon Bulletin 529 which, we reiterate, is not at issue herein. Moreover, the subject laws and regulations fall within the "State action" exemption to the Sherman Act and thus do not violate the Act nor, by implication, the Supremacy Clause (see *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.,* 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361; *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91; *City of Lafayette* v. *Louisiana Power and Light Co.,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364). The exemption applies since the excise tax was specifically authorized by State laws, and enforced by State and municipal officials acting as State agents (see *Parker* v. *Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315; Tribe, American Constitutional Law, § 5-22, p. 309, n. 12; see, also, *National League of Cities* v. *Usery,* 426 U.S. 833, 855, n. 20, 96 S.Ct. 2465, 2476, n. 20, 49 L.Ed. 2d 245).

REMAINING CHALLENGES

(13) We find no consistency between Local Law No. 30 and section 101-b of the Alcoholic Beverage Control Law violative of section 2 (subd. (c), par. (ii)) of article IX of the New York State Constitution. By focusing their challenge once again on Bulletin 529 plaintiffs and plaintiff-intervenors have effectively raised no valid argument regarding an alleged inconsistency. In any regard, Local Law No. 30 is solely revenue producing while section 101-b of the Alcoholic Beverage Control Law is purely regulatory. Such statutes are to be harmonized whenever possible (*Cimo* v. *State of New York,* 306 N.Y. 143, 116 N.E.2d 290), and section 445 of the Tax Law and Local Law No. 30, enacted long after section 101-b of the Alcoholic Beverage Control Law should prevail (*People ex rel. Thorpe* v. *Clark,* 62 A.D.2d 216, 403 N.Y. S.2d 910; see McKinney's Cons. Laws of N.Y., Book 1, Statutes, §§ 391, 398).

(14) The technical violation of section 39 of the New York City Charter, which requires approval at a public referendum of any enactment transferring powers vested in a municipal agency to a non-municipal agency, does not void the local law. While it is true that the power to administer and collect all excise taxes is placed in the Department of Finance (N.Y. City Charter, §§ 39, 1504, subd. 2; Administrative Code, § Y46-4.0), and here, such power has been transferred to the State Tax Commission without referendum approval, we hold that the State, through the enabling act (Tax Law, § 445) authorizing Local Law No. 30, and section Y46-4.0 of the Administrative Code of the City of New York, has effectively superseded the referendum requirement provision of sec-

tion 39 of the New York City Charter (see *City of New York* v. *Maltbie*, 274 N.Y. 90, 96-97, 8 N.E.2d 289; *Rooney* v. *City of Long Beach*, 42 A.D.2d 34, 39, 345 N.Y.S.2d 66, app. dsmd. 33 N.Y.2d 897, 352 N.Y.S.2d 449, 307 N.E. 2d 564).

(15) Plaintiffs' argument concerning inconsistencies between the local law and section 171-a of the Tax Law, respecting disposition of the excise taxes, presents no real conflict. The statutes relate to different taxes from different sources, and may easily be harmonized since proceeds from State taxes inure to the State and those from the city tax revert to the city (Administrative Code, § Y46-5.0; see McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 391, p. 555, n. 11).

(16) Nor do we find that the local law offends the 21st Amendment to the United States Constitution, because there is no attempt made to regulate either the transportation or importation of liquor into this State. The imposition of an excise tax at the moment of sale or use of goods after they have come to rest in the city is within the sovereign power of the State, here, passed on to the City of New York by the enabling act.

Finally, having failed to establish that Local Law No. 30 is violative of either the United States or New York Constitutions, or in any other respect invalid, neither plaintiffs nor plaintiff-intervenors are entitled to an injunction enjoining enforcement of the law.

The judgment should be affirmed, without costs.

Judgment affirmed, without costs.

Local Law No. 30 of 1980 of the City of New York

Local Law 30

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to raising revenue by imposing taxes on beer and liquor sold or used in the city of New York.

Be it enacted by the Council as follows:

Section 1. Chapter forty-six of the administrative code of the city of New York is amended by adding a new title Y, to read as follows:

TITLE Y

TAX ON BEER AND LIQUOR

§Y46-1.0. *Definitions.*—When used in this title the following terms shall mean or include:

1. "Person." An individual, partnership, society, association, corporation, joint stock company, and any combination of individuals, and also an executor, administrator, receiver, trustee or other fiduciary.

2. "Alcohol." Ethyl alcohol, hydrated oxide of ethyl or spirit of wine, from whatever source or by whatever process produced.

3. "Beers." All alcoholic beer, lager beer, ale, porter, and stout, and all other fermented beverages of any name

or description manufactured from malt, wholly or in part, or from any substitute therefor containing one-half of one per centum, or more, of alcohol by volume.

4. "Liquors." Any and all distilled or rectified spirits, alcohol, brandy, cordial (whether the base therefore be wine or liquor), whisky, rum, gin and all other distilled beverages containing alcohol, including all dilutions and mixtures of one or more of the foregoing, including any alcoholic liquids which would be wines if the alcoholic content thereof were not more than twenty-four per centum by volume. Such term shall not include liquors containing not more than twenty-four per centum of alcohol by volume.

5. "Alcoholic beverages." Beers or liquors.

6. "Distributor." Any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufactures, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale, except (a) a person who manufactures, mixes or compounds alcoholic beverages the ingredients of which consist only of alcoholic beverages on which the taxes imposed by this title have been paid, and (b) a person who mixes or compounds alcoholic beverages with non-alcoholic ingredients for sale and immediate consumption on the premises, who shall be a distributor only with respect to the ingedients which consist of alcoholic beverages upon which the taxes imposed by this title have not been paid.

7. "Noncommercial importer." A person other than a distributor who imports or causes to be imported into this city alcoholic beverages, except that such person shall not be a noncommercial importer where he imports or causes to be imported into this city alcoholic beverages in the quantities and under the condition provided by subdivision (c) of section Y46-2.0 of this title.

8. "Sale." Any transfer, exchange or barter in any manner or by any means whatsoever. The sale of warehouse receipts given upon the storage of alcoholic beverages shall not be construed as a sale of the beverage represented by such receipts.

9. "Use." Any compounding or mixing of alcoholic beverages with other ingredients or other treatment of the same in such manner as to render them unfit or unsuitable for consumption as a beverage and also the actual consumption or possession for consumption of alcoholic beverages as beverages or otherwise.

10. "Gallon." One hundred twenty-eight fluid ounces: "quart" means thirty-two fluid ounces.

11. "Liter." A metric unit of capacity equal to one thousand cubic centimeters of alcoholic beverages and equivalent to thirty-three and eight hundred fourteen thousand fluid ounces.

12. "City." The city of New York.

13. "Commissioner of Finance." Commissioner of finance of the city.

14. "Tax Commission." The tax commission of the state of New York.

15. Unless a different meaning is clearly required, any term used in this title shall have the same meaning as when used in a comparable context in the laws of the state of New York relating to taxes on alcoholic beverages.

§Y46-2.0. Imposition of tax.

(a) There are hereby imposed on a distributor and a noncommercial importer excise taxes at the following rates:

(1) twelve cents per gallon upon beers; and

(2) twenty-six and four-tenths cents per liter upon liquors, when sold or used within this city, except when sold or used under such circumstances that this city is without power to impose such tax or when sold to the United States, and except beers when sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, and except when sold to professional foreign consuls-generally, consuls and vice-consuls who are nationals of the state appointing them and who are assigned to foreign consulates in this city provided that American consular officers of equal rank who are citizens of the United States and who exercise their official functions at American consulates in such foreign country are granted reciprocal exemptions; provided, however, that the tax commission may

permit the sale of alcohol without tax to holder of any industrial alcohol permit, alcohol permit or alcohol distributor's permit issued by the state liquor authority, and by the holder of an alcohol distributor's permit, class A, issued by such authority to a holder of a distiller's license, class B, or a winery license, issued by such authority and may also permit the use of alcohol for any purpose other than the production of alcoholic beverages by such holders without tax.

Notwithstanding any other provision of this title, the tax commission may permit the purchase of liquors without tax by a holder of a distiller's license issued by the state liquor authority from another holder of a distiller's license by such authority, in which event the liquors so purchased shall be subject to the tax imposed by this title in the hands of the purchaser in the same manner and to the same extent as if such purchaser had imported or caused the same to be imported into this city or had produced, distilled, manufactured, brewed, compounded, mixed or fermented the same within this city.

(b) There is also imposed on each person, other than a distributor within the meaning of this title, who, on the effective date of this title, owns and possesses for the purposes of sale beers or liquors, a floor tax at the rates applicable under subdivision (a) upon such beer in excess of one hundred gallons and upon such liquor in excess of four hundred liters. Such floor tax shall be due and payable on the twentieth day of the month succeeding the month in which this title becomes effective.

(c) If, prior to the taking effect of this title, a contract of sale of alcoholic beverages was made, and delivery thereof pursuant to such contract is made within this city on or after the effective date of this title, the vendor shall be deemed a distributor for the purposes of this title, and such alcoholic beverages shall be deemed to be sold, and shall be subject to such taxes, at the time of such delivery.

(d) In any case where the quantity of alcoholic beverages taxable pursuant to this title is a fractional part of one liter (or one gallon in the case of beers) or an amount greater than a whole multiple of liters (or gallons in the case of beers), the amount of tax levied and imposed on such fractional part of one liter (or one gallon in the case of beers), or fractional part of a liter (or gallon) in excess of a whole multiple of liters or gallons shall be such fractional part of the rate imposed by subdivision (a) and (b) of this section.

(e) Notwithstanding any other provisions of this title, there shall be exempt from the taxes imposed under this title, per month, one quart of alcoholic beverages (or one gallon of such beverages in the case of a person arriving directly from American Samoa, Guam or the Virgin Islands of the United States not more than one quart of which shall have been acquired elsewhere than in such insular possessions):

(1) purchased outside this city as an incident to a journey from which the purchaser is returning and

(2) not to be offered for sale or used for any commercial purpose, provided such alcoholic bever-

ages accompany such person on his return to this city and provided, further, that in the case of a person arriving in this city from other than a state of the United States (including the District of Columbia), the Virgin Islands of the United States or a contiguous country maintaining a free zone or free port, such person shall have remained beyond the territorial limits of the United States for a period of not less than forty-eight hours.

Provided, however, where the amounts purchased outside the city or brought in exceed the amounts specified in this subdivision (e) but are not in excess of one liter in the case of the reference to one-quart or four liters in the case of the references to one gallon, and where no duty is required by the laws of the United States to be paid on such amounts, such metric standards of fill shall be substituted for one-quart and one gallon, respectively, and such amounts shall be exempt from tax under the conditions provided for in this subdivision (e).

§Y46-3.0 *Manner of administration and collection.*

All the provisions of article eighteen of the tax law shall apply to the taxes imposed by subdivision (a) of section Y46-2.0 of this title, and the provisions of sections four hundred twenty, four hundred twenty-six, four hundred twenty-nine through four hundred thirty-four, four hundred thirty-six and four hundred thirty-seven of article eighteen of the tax law shall apply to the tax imposed by subdivision (b) of section Y46-2.0, so far as such article or sections can be made applicable to the taxes imposed by this title with such limitations as set forth in section four hundred forty-five of the tax law and such modifications as may be necessary in order to adapt such language to the taxes imposed by this title.

Local Law No. 30 of 1980 of the City of New York

§ Y46-4.0. *State tax commission; administration*

The taxes imposed by this title shall be administered and collected by the tax commission in the same manner as the taxes imposed under sections four hundred twenty-four and four hundred twenty-five of article eighteen of the tax law subject to all provisions of that article as may be applicable. The tax commission may make such provisions as it deems necessary for the joint administration and collection of the state and local taxes imposed and authorized by article eighteen of the tax law and this title. Nothing in article eighteen or this title which requires payment of both state and local taxes to the tax commission shall be construed as the payment of either tax more than once.

§ Y46-5.0. *Disposition of revenues.*

All taxes, penalties and interest imposed by this title, which are collected by the state tax commission, shall be deposited daily with such responsible banks, banking houses or trust companies, as may be designated by the state comptroller, to the credit of the comptroller, in trust for this city. Such deposits shall be kept in trust and separate and apart from all other monies in the possession of the comptroller. The comptroller shall require adequate security from all such depositories of such revenues collected by the tax commission. The comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds in respect of the taxes imposed by this title, and for reasonable costs of the state tax commission in administering, collecting and distributing such taxes, out of which the comptroller shall pay any refunds of such taxes

to which taxpayers shall be entitled under the provisions of this title. The comptroller, after reserving such refund and such costs shall, on or before the twelfth day of each month, pay to the commisioner of finance the taxes penalties and interests imposed by this title, collected by the state tax commission pursuant to this title during the next preceding calendar month. The amount so payable shall be certified to the comptroller by the president of the state tax commission or his delegate, who shall not be held liable for any inaccuracy in such certificate. Where the amount so paid over to the city in any such distribution is more or less than the amount then due to the city, the amount of the overpayment or underpayment shall be certified to the comptroller by the president of the state tax commission or his delegate, who shall not be held liable for any inaccuracy in such certificate. The amount of the overpayment or underpayment shall be so certified to the comptroller as soon after the discovery of the overpayment or underpayment as reasonably possible and subsequent payments and distributions by the comptroller to the city shall be adjusted by subtracting the amount of any such overpayment from or by adding the amount of such underpayment to such number of subsequent payments and distribution as the comptroller and the president of the state tax commission shall consider reasonable in view of the amount of the overpayment or underpayment and all other facts or circumstances.

§ Y46-6.0. *Construction.*

This title shall be construed and enforced in conformity with section four hundred forty-five of the tax law, pursuant to which it is enacted.

§ Y46-7.0. *Separability.* If any provision of this title, or the application thereof to any person or circumstances,

is held invalid, the remainder of this title, and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 2. This local law shall take effect August first, nineteen hundred eighty; provided, however, that if the tax commission fails to waive the sixty day minimum notice requirement contained in subdivision five of section four hundred forty-five of the tax law or if the notice prescribed therein is not given to the tax commission at least thirty days prior to August first, nineteen hundred eighty, this local law shall take effect on September first, ninteen hundred eighty.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, S.S.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on June 12, 1980, and approved by the Mayor on June 23, 1980.

DAVID N. DINKINS, City Clerk, Clerk of the Council

CERTIFICATION PURSUANT TO MUNICIPAL HOME RULE LAW, SECTION 27

Pursuant to the provisions of Municipal Home Rule Law Section 27, I hereby certify that the enclosed local law (Local Law No. 30 of 1980, Council Int. No. 822), contains the correct text and received the following vote at the meeting of the New York City Council on June 12, 1980: 29 for, 10 against, 2 not voting.

Was approved by the Mayor on June 23, 1980.

Was returned to the City Clerk on June 23, 1980.

ALLEN G. SCHWARTZ, Corporation Counsel.

Notice of Appeal

IN THE

SUPREME COURT OF THE STATE OF NEW YORK

County of Albany

County Clerk's Index No. 7582/80

METROPOLITAN PACKAGE STORE ASSOCIATION, INC., PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

—against—

EDWARD I. KOCH as Mayor of the City of New York, and THE CITY OF NEW YORK and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION, and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, ROBERT T. DOYLE as the Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellees.

Notice of Appeal

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 21, 1983

I. Notice is hereby given that METROPOLITAN PACKAGE STORE ASSOCIATION, INC., et al, the plaintiffs-appellants above-named, hereby appeal to the Supreme Court of the United States from the final order of the State of New York Court of Appeals entered in this action on March 29, 1983, leaving standing an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered November 16, 1982, affirming the Judgment of the Supreme Court, Albany County, entered on the 29th day of January, 1982, (1) granting defendants-appellees' motion for summary judgment; (2) denying the motions of plaintiffs-appellants and plaintiffs-intervenors-appellees for summary judgment; and (3) dismissing the complaints of plaintiffs-appellants and plaintiffs-intervenors-appellees.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

II. The Clerk will please prepare a certified copy of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said certified copy the following:

> Remittitur of the Court of Appeals, State of New York including the record on appeal to said Court of Appeals and the order of said Court of Appeals dated March 29, 1983.

III. The following questions are presented by this appeal.

Notice of Appeal

1. Does the Twenty-first Amendment to the Constitution of the United States permit the City of New York to enact local laws violative of other federal constitutional guarantees?

2. Does Local Law No. 30 of 1980 of the City of New York violate Article VI, Cl. 2, of the Constitution of the United States?

3. Does Local Law No. 30 of 1980 of the City of New York violate Article I, Section 8, of the Constitution of the United States?

4. Does Local Law No. 30 of 1980 of the City of New York violate the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States?

5. Does Local Law No. 30 of 1980 of the City of New York violate Article I, Section 10, of the Constitution of the United States?

6. Does Local Law No. 30 of 1980 of the City of New York violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States?

Dated: New York, New York
June 17, 1983

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Notice of Appeal

TO:

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Albany, New York

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Notice of Appeal

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Judgment of Special Term January 29, 1982

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany at the County Courthouse, City of Albany, State of New York on the 14th day of September, 1981.

Present:

Hon. John H. Pennock, Justice

METROPOLITAN PACKAGE STORE ASSOCIATION, INC., PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs,

—against—

EDWARD I. KOCH as Mayor of the City of New York, and THE CITY OF NEW YORK AND THOMAS LYNCH as President and Members of the STATE TAX COMMISSION, and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, ROBERT T. DOYLE and DOROTHEA J. KLAJBOR as the Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Plaintiffs-Intervenors.

Judgment of Special Term January 29, 1982

JUDGMENT

Index No. 7582/80

Office of

Albany County Clerk

Albany, N.Y.

Jan 29 11:21 AM '82

Plaintiffs, in this action for a declaratory judgment and an injunction, having moved for an order pursuant to CPLR 3212 striking out the defendants' answer and directing the entry of summary judgment in favor of the plaintiffs for the relief demanded in the complaint on the ground that there is no defense to the action, and the defendants having requested that summary judgment be granted in their favor, and the motions having regularly come on to be heard before me,

AND, after handing down an opinion dated November 5, 1981, which directed that summary judgment be granted to the defendant City of New York, having sua sponte, on December 21, 1981, set the matter down for reargument, and reargument having come on to be heard before me,

NOW, upon reading the Summons and Complaint of the plaintiffs; the Amended Complaint of the intervenor-plaintiffs Ace Wines & Liquor, Inc., *et al.*; the Complaint of the intervenor-plaintiffs Retailers Alliance, Inc., *et al.*; the Answers of the defendants City of New York and Edward I. Koch; the Answers of the State Tax Commission and State Liquor Authority; the plaintiffs' Motion for Summary Judgment, dated August 14, 1981, and the affidavit

of Gerard A. Navagh, dated August 12, 1981, together with the exhibits annexed thereto, in support of the motion; the affidavit of Francis R. Buscemi, dated August 28, 1981 together with the exhibit annexed thereto, in support of the motion; the affidavit of Isaac C. Donner, dated August 28, 1981, together with the exhibits annexed thereto, in opposition to the plaintiffs' motion and in support of a Request for Summary Judgment in favor of the defendants City of New York and Edward I. Koch; the affidavit of Francis V. Dow, dated August 27, 1981, together with the exhibits annexed thereto, in opposition to the plaintiffs' motion and in support of a Request for Summary Judgment in favor of the defendants State Tax Commission; the affirmation of Gerard A. Navagh, dated September 2, 1981, in reply to the defendants' affidavits; the affirmation of FRANCIS R. BUSCEMI, ESQ., dated January 4, 1982, in support of reargument; the affirmation of SEYMOUR HOWARD, ESQ., dated December 31, 1981, in support of reargument; and after hearing GERARD A. NAVAGH, ESQ., attorney for the plaintiffs, SEYMOUR S. HOWARD, ESQ., attorney for plaintiffs-intervenors Ace Wines & Liquors, Inc., *et al.*, and FRANCIS R. BUSCEMI, ESQ., attorney for plaintiffs-intervenors Retailers Alliance, Inc., *et al.*, all in support of the motion; and after hearing ISAAC C. DONNER, ESQ., Special Assistant Corporation Counsel of the City of New York, attorney for defendants City of New York and Edward I. Koch, and FRANCES V. DOW, ESQ., Assistant Attorney General, attorney for the State Tax Commission, both in opposition to the motion and in support of requests for summary judgment in favor of the defendants; and after hearing said GERARD A. NAVAGH, and SEYMOUR HOWARD in support of reargument; and after hearing STANLEY BUCHSBAUM,

ESQ., Special Assistant Corporation Counsel of the City of New York in opposition to reargument; and after due deliberation thereon, it is

ORDERED, that the plaintiffs' motion for summary judgment be and the same hereby is in all respect denied, and it is further

ORDERED AND ADJUDGED, that the defendants' request for summary judgment be and the same hereby is in all respects granted, and it is further

ORDERED, that reargument is granted and, on reargument, the determination directed by the opinion of November 5, 1981, is adhered to, and it is further

ORDERED, ADJUDGED AND DECLARED that:

1) Chapter 406 of the Laws of 1971, as amended by Chapter 433 of the Laws of 1978, and New York City Local Law No. 30 for 1980 are valid and constitutional in all respects.

2) Neither the State Enabling Act nor the Local Law is violative of the Commerce Clause or the Import-Export Clause of the United States Constitution.

3) Neither the State Enabling Act nor the Local Law is violative of the Due Process or the Equal Protection Clauses of the United States Constitution or of such clauses in the New York State Constitution.

4) Neither the State Enabling Act nor the Local Law is unconstitutionally vague or, by reason of delegations of legislative power, violative of due process.

5) Neither the State Enabling Act nor the Local Law is violative of Section 16 or Section 22 of Article III of the New York State Constitution.

Judgment of Special Term January 29, 1982

6) The Local Law is not in conflict with Tax Law, Section 171-a or with Alcoholic Beverage Control Law, Section 101-b or 101-bb.

7) The enactment of the Local Law by the New York City Council without a prior referendum was not violative of Section 39 of the New York City Charter.

8) Neither the State Enabling Act nor the Local Law involve improper price-fixing or improper restraint of trade and neither is violative of the federal Sherman Anti-Trust Act or Robinson-Patman Act or of Article 22 of the New York General Business Law or of any other federal or New York statute relating to restraint of trade or price-fixing.

9) Bulletin No. 529 issued by the New York State Liquor Authority in no way implements the Local Law or the tax imposed by it.

ORDERED, ADJUDGED AND DECREED that the complaints herein, insofar as they seek to restrain and enjoin the defendants from imposing, levying and collecting the tax imposed by Local Law No. 30, are dismissed.

January 22, 1982

ENTER

JOHN H. PENNOCK
J.S.C.

s/ MARY S. LINDSAY
Deputy Clerk
Clerk of the Courts

(Sworn to January 29, 1982)

Opinion in *Mancini* v. *McLaughlin* 54 NY 2nd 860

COURT OF APPEALS

State of New York

October 13, 1981

On Reargument November 24, 1981

54 N.Y.2d 860

FRANK MANCINI, JR.,

Appellant,

v.

EDWARD J. McLAUGHLIN, et al., Constituting the State Liquor Authority,

Respondents.

IN THE MATTER OF

JACK R. BATTIPAGLIA,

Appellant,

v.

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

Opinion in Mancini v. McLaughlin 54 NY 2d 860

Cross appeals were taken from an order of the Supreme Court, Queens County Edmund J. Wilowski, J., denying State Liquor Authority's cross motion to dismiss claim and petition seeking to enjoin enforcement of bulletin promulgated for purpose of implementing collection of New York City excise tax on liquor. The Supreme Court, Appellate Division, Second Department, 79 A.D.2d 649, 433 N.Y.S.2d 827, reversed, and appeal was taken. The Court of Appeals held that State Liquor Authority exceeded the authority conferred upon it by statute by issuing a bulletin implementing collection of a New York City excise tax on alcoholic beverage consumed within city by requiring wholesalers to pass along the amount of the tax plus a 20 percent markup of such tax to retailers, who were required to include those increases in their minimum resale prices to consumers.

Reversed.

Jasen, Jones and Meyer, JJ., dissented.

Motion for reargument or to amend remittitur granted in part.

Opinion in Mancini v. McLaughlin 54 NY 2d 860

OPINION OF THE COURT

MEMORANDUM

The order of the Appellate Division should be reversed and the relief sought by the appellants granted, with costs.

(1, 2) Before a court can determine whether an agency acted reasonably in taking a particular action it must find that the agency had authority to act in the first instance. In this case neither section 101-b nor any other section of the Alcoholic Beverage Control Law requires that the New York City excise tax or a 20% markup be included in cost, or permits the State Liquor Authority to direct that it be so included. Thus the State Liquor Authority exceeded the authority conferred upon it by statute. Although it appears that the agency's action is meant as a temporary measure, it may not act in excess of its authority even temporarily.

COOKE, C. J. and GABRIELLI, WACHTLER and FUCHSBERG, JJ., concur in memorandum.

JASEN, JONES and MEYER, JJ., dissent and vote to affirm for reasons stated in the memorandum at the Appellate Division (79 A.D.2d 649, 433 N.Y.S.2d 827).

Order reversed, etc.

On Reargument

Motion by State Liquor Authority for reargument or to amend the remittitur granted in the following respects: (1) The remittitur herein is recalled and, when returned,

it will be amended to read as follows: Order reversed, with costs, and the relief sought by the appellants granted to the extent of enjoining respondents from enforcing bulletin 529.

(2) The memorandum is amended to reflect the above limitation in the relief granted to appellants and by adding the following sentence: "We reach only the question of the authority's right to adopt mandatory regulations."

Tax Law

§ 421. *Registration of distributors.* The department of taxation and finance, upon the application of a distributor, shall register such distributor in suitable books to be kept by the department for that purpose. The application shall be in a form and contain such data as the department of taxation and finance shall prescribe. No distributor, unless so registered, shall make any sale of alcoholic beverages within this state, except a sale, if any, as to which this state is without power to impose such condition.

§ 422. *Bonds of distributors.* The tax commission may require any distributor to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in the state, in such amount as the tax commission may fix, to secure the payment of any sums due from such distributor pursuant to this article. The tax commission may require that such a bond be filed before a distributor is registered, or at any time when in its judgment the same is necessary as a protection to the revenues under this article. In lieu of such bond, a distributor may deposit securities approved by the tax commission, in such amount as it may prescribe, which securities shall be kept in the joint custody of the comptroller and the commissioner of taxation and finance and may be sold by the tax commission if it becomes necessary so to do in order to recover any sums due from such distributor pursuant to this article; but no such sale shall be had until after such distributor shall have had opportunity to litigate the validity of any tax if it elects so to do. Upon any such sale, the surplus, if any,

above the sums due under this article, shall be returned to such distributor.

* * *

§ 426. *Records to be kept by distributors, owners and others.* Every distributor, owner or other persons shall keep a complete and accurate record of all purchases and sales or other dispositions of alcoholic beverages, and a complete and accurate record of the number of gallons of beers produced, manufactured, brewed or fermented and liters of all other alcoholic beverages produced, distilled, manufactured, brewed, compounded, mixed or fermented. Such records shall be in such form and contain such other information as the tax commission shall prescribe. Said commission, by rule or regulation, also may require the delivery of statements to purchasers of alcoholic beverages, and prescribe the matters to be contained therein. Such records and statements, unless required by the tax commission to be preserved for a longer period, shall be preserved for a period of one year and shall be offered for inspection at any time upon oral or written demand by the commissioner of taxation and finance or his duly authorized agents, and every such distributor, owner or other person shall make such reports to the department of taxation and finance as may be required by the tax commission. Nothing in this section contained shall be construed to require the keeping of a record of the purchase or disposition of alcoholic beverages by a consumer thereof, except by a person who uses the same for commercial purposes, or of the sale of alcoholic beverages at retail.

§ 427. *Exception from retail sales tax.* (Now obsolete.)

Tax Law

§ 428. *Records and reports of transportation.* Every person transporting alcoholic beverages within this state, whether such transportation originates within or without this state, when required by the tax commission, shall keep a true and accurate record of all alcoholic beverages so transported, showing such facts with relation to such alcoholic beverages and their transportation as the tax commission may require. Such record shall be open to inspection by the reperesentatives of the department of taxation and finance at any time and the tax commission may require from any such person returns of all or any part of the information shown by such records.

* * *

§ 432. *Tax to be paid but once; foreign and interstate commerce; injunction.* Nothing in this article shall be construed to require the payment to the department of taxation and finance of the taxes imposed by this article more than once on any quantity of alcoholic beverages sold or used within this state. No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. The supreme court shall have jurisdiction to restrain the department, by injunction, from collecting a tax under this article upon any sale as to which, by reason of the United States constitution and the laws of the United States enacted pursuant thereto, such a tax cannot be imposed.

§ 433. *Penalties.* * * *

* * *

2. Any distributor or owner who or which files or causes to be filed any return or statement, required or permitted by this article, which is wilfully false shall be guilty of a felony.

• • •

§ 445. Local taxes on beer and liquor by a city of one million or more.

• • •

4. • • • Nothing in this article which requires payment of both state and local taxes to the tax commission shall be construed as the payment of either tax more than once.

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